

No. 42138-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

ERIC RUSSELL, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon

No. 10-1-00199-9

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Because Russell's plea of guilty was knowing, voluntary and intelligent, the trial court did not err when it denied Russell's motion to withdraw his plea.
2. Russell was competent when he entered his plea of guilty. There was no reason to suspect that he was not competent. And no party raised competency as an issue or requested a hearing to determine competency. Therefore, the trial court did not err by not holding a hearing on competency prior to accepting Russell's plea of guilty.
3. The trial court did not err by entering Finding of Fact No. 6.
4. The trial court did not err by entering Finding of Fact No. 7.
5. The trial court's Conclusion of Law No. 1 is correct.
6. In exchange for Russell's plea of guilty, the State agreed to recommend a first time offender status sentence. Because a first time offender status sentence includes community custody and statutory conditions, the State did not breach the plea agreement when it asked the trial court to impose a mental health evaluation and treatment as a condition of community custody.
7. The trial court erred by ordering Russell to complete mental health counseling as a condition of community supervision.

B. FACTS AND STATEMENT OF THE CASE

Russell was initially charged on June 22, 2010, by a two-count information with Manufacture of a Controlled Substance and Unlawful

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Possession of a Controlled Substance. CP 64-65. On November 15, 2010, pursuant to a plea agreement, the State orally amended the charges to felony possession of marijuana and possession of methamphetamine.¹ RP 25. When the oral amendment was presented to the court, the judge asked for clarification, as follows: "I just want to inquire -- it's one count with an alternative charge?" The prosecutor answered, "[t]hat's correct your honor." RP 25.

The court addressed Russell on the record and engaged in a colloquy with him regarding the orally amended charges and Russell's plea of guilty to the amended charge. RP 26-35. Regarding the oral amendment, the court addressed Russell as follows:

By an amendment, orally, today you are charged with one count that has an alternative charge in it. First, possession of over 40 grams of marijuana and/or possession of methamphetamine. Do you understand what the nature of charge is, what it's all about?

RP 27. Russell answered, "yes." RP 27.

Russell was adequately informed of the consequences of his plea, the maximum sentence he faced, the rights he was giving up, that he would be prohibited from possession of a firearm, that he could be

¹ When describing the amended charges, the prosecutor apparently misspoke and referred to "pounds" of marijuana instead of "grams" of marijuana, but the charge was possession

sentenced to community custody, and other consequences of his plea. RP 24-36. Russell did not show any difficulty understanding the plea or answering the judge's questions. RP 24-36. After his plea was final, sentencing was set over to a future hearing. RP 34. It was not until the after the plea was final, but before sentencing, that Russell then began to seek to withdraw his plea and began to show any trouble hearing or understanding. RP 36-114.

C. ARGUMENT

1. Because Russell's plea of guilty was knowing, voluntary and intelligent, the trial court did not err when it denied Russell's motion to withdraw his plea.

Russell presents various assertions to support his efforts to nullify his plea of guilty. He argues on appeal that at the trial court level he could not adequately hear the proceedings, that he couldn't understand, that he had reservations about pleading guilty, that he did not understand the nature of the charge, that he didn't understand that he was pleading guilty, that he has a learning disability, and that he doesn't "believe" that his

of 40 or more grams of marijuana and possession of methamphetamine. CP 51-52.

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attorney adequately explained things to him. Appellant's Brief, 3-12.

However, the record shows that when Russell entered his plea, the trial court went over the plea in great detail, including the oral amendment to a lesser charge, the consequences of the plea, and the rights that Russell was giving up by entering a plea of guilty, and that the court then inquired and determined that the plea was entered knowingly, voluntarily, and intelligently, and considered the factual basis for the plea. RP 26-34. During the court's colloquy, Russell did not express any confusion regarding his plea of guilty, confusion about the charges, or confusion about the consequences of pleading guilty. RP 26-34. During the guilty plea colloquy and the taking of the guilty plea, there are no facts or circumstances in the record from which it can be clearly shown, or even extrapolated, that Russell was having difficulty hearing or understanding what was occurring. RP 26-34. The court went through a long series of questions with Russell. Russell answered each question appropriately, and he never showed any doubt, confusion, or potential misunderstanding to any question. RP 26-34.

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The trial court judge was in the best position to view Russell's demeanor, conduct and appearance. The trial court judge went over the guilty plea in great detail with Russell and observed that he was competent to enter the plea and that he did so knowingly, voluntarily, and intelligently. It was soundly within the trial court's discretion to make these findings. *State v. Osborne*, 102 Wn.2d 87, 684 P.2d 683 (1984); *State v. Scylors*, 70 Wn.2d 7, 422 P.2d 477 (1966).

Russell has not presented any evidence or citation to the record to support his assertions in regard to his actual plea. Russell's citations to the record are citations to his attorney's post-plea arguments and to purported examples of Russell's post-plea confusion. When Russell pled guilty, however, the record shows that he was clearly competent and that his plea was knowing, voluntary and intelligent. RP 24-36. To withdraw his plea, Russell bears the burden of proving that withdrawal of the plea is necessary to correct a manifest injustice. *In re Detention of Scott*, 150 Wn. App. 414, 426-427, 208 P.3d 1211 (2009). While Russell may have had second thoughts or otherwise decided that he was dissatisfied with his guilty plea after he had pled guilty, he has not shown any manifest injustice in regard to the guilty plea itself or the finding of guilt that

followed his guilty plea. To withdraw his guilty plea, Russell must show that manifest injustice requires withdrawal of the plea. *State v. Sauts*, 118 Wn.2d 37, 820 P.2d 505 (2001).

Manifest injustice in this context may include a finding that the plea was: (1) entered without effective assistance of counsel; (2) entered without the defendant's ratification; (3) an involuntary plea; or, (4) breached by the prosecution. *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001); *State v. Wilson*, 162 Wn. App. 409, 253 P.3d 1143 (2011); CrR 4.2. The record shows that Russell ratified the guilty plea, that he had effective assistance of counsel, and that he was competent and voluntarily pled guilty. The record also shows that the prosecutor did not breach the plea agreement. However, Russell argues as a separate issue on appeal that the prosecutor did breach the plea agreement; therefore, this issue is answered by the State below, in Section 6 of the State's brief.

2. Russell was competent when he entered his plea of guilty. There was no reason to suspect that he was not competent. And no party raised competency as an issue or requested a hearing to determine competency. Therefore, the trial court did not err by not holding a hearing on competency prior to accepting Russell's plea of guilty.

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Because Russell seeks to withdraw his plea by claiming on appeal that he was not competent to enter the plea, his claim of incompetence is the equivalent of a claim that his plea was not voluntary. *State v. Marshall*, 144 Wn.2d 266, 27 P.3d 192 (2001). That Russell's plea was voluntary, knowing and intelligent is well supported by the record, as discussed in Section 1 of the State's brief, above.

Russell exhibited no incompetency during the plea and did not raise incompetency as an issue in the trial court until he made self-serving allegations in support of his motion to withdraw his plea. Russell has provided argument, but no evidence, to support his assertion that he was not competent. The trial court specifically found that Russell was competent to enter the plea. RP 24-36; CP 10-12. The record shows that Russell was competent when he pled guilty and that he did because he was guilty and wanted to take advantage of the plea bargain. Thus, Russell has not met his burden of showing manifest injustice, and the trial court correctly exercised its discretion when it denied Russell's motion to withdraw his plea. *State v. Osborne*, 102 Wn.2d 87, 684 P.2d 683 (1984).

3. The trial court did not err by entering Finding of Fact No. 6.

The record shows that the trial court did not err by entering Finding of Fact No. 6. RP 24-36; CP 11. Because Finding of Fact No. 6 is well supported by substantial evidence in the record, it was well within the discretion of the trial court, as the finder of fact, to make this finding. . *State v. Osborne*, 102 Wn.2d 87, 684 P.2d 683 (1984); *State v. Saylor*, 70 Wn.2d 7, 422 P.2d 477 (1966).

4. The trial court did not err by entering Finding of Fact No. 7.

The record shows that the trial court did not err by entering Finding of Fact No. 7. RP 24-36; CP 11. Because Finding of Fact No. 7 is well supported by substantial evidence in the record, it was well within the discretion of the trial court, as the finder of fact, to make this finding. *State v. Osborne*, 102 Wn.2d 87, 684 P.2d 683 (1984); *State v. Saylor*, 70 Wn.2d 7, 422 P.2d 477 (1966).

5. The trial court's Conclusion of Law No. 1 is correct.

The record shows that the trial court did not err by entering Conclusion of Law No. 1. RP 24-36; CP 11.

6. In exchange for Russell's plea of guilty, the State agreed to recommend a first time offender status sentence. Because a first time offender status sentence includes community custody and statutory conditions, the State did not breach the plea agreement when it asked the trial court to impose a mental health evaluation and treatment as a condition of community custody.

As a part of the plea bargain to the amended charges, the prosecutor agreed that in exchange for Russell's plea of guilty the prosecutor would recommend first time offender status, 35 days incarceration with 30 days converted to alternatives, credit for time served, and standard fines. CP 56; RP 29, 93-95. Russell does not dispute the sentencing recommendation or the sentence he received other than his objection to the community custody condition that required him to obtain a mental health evaluation and follow-up treatment.

The trial court followed the prosecutor's agreed recommendation and sentenced Russell to a first time offender status under RCW

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9.94A.030 and RCW 9.94A.650. CP 16. First time offender status authorizes the court to "impose up to six months of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year,"² and authorizes the court to impose conditions set forth in RCW 9.94A.703. RCW 9.94A.650(3), .650(4). The conditions set forth in RCW 9.94A.703 include the following conditions:

- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

RCWA 9.94A.703(3)(c) and (3)(d).

When Russell entered his plea, the trial court warned him that if he were given first time offender status he could be given up to two years of community custody and that he would be monitored by the Department of Corrections. RP 28. Russell expressed no confusion, surprise, or objection. RP 28.

² The trial court sentenced Russell to 24 months of community custody, but Russell does not raise this issue on appeal. CP 16.

The plea agreement was silent in regard to the term of community supervision or what the conditions would be. The prosecutor agreed to recommend first time offender status. First time offender status may include a period of community custody and may include conditions, such as mental health treatment, but the prosecutor's agreement was silent as to these conditions. When the prosecutor asked the court to impose the condition of a mental health evaluation and treatment, he did not breach any agreement with the defendant. The agreement was for first time offender status. This agreement was satisfied. First time offender status may, by statute, include community custody with the condition of a mental health evaluation.

The prosecutor breaches a plea agreement if by words or conduct the prosecutor contradicts the State's recommendation. *State v. Julian*, 102 Wn. App. 296, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003, 20 P.3d 944. In the instant case, the prosecutor did not contradict the State's recommendation.

Still more, Russell has asserted on appeal that the trial court lacked statutory authority to require mental health treatment on the facts of this case, and this issue is argued in Section 7 of the State's brief, below. The

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State is prepared, on the facts of this case, to concede Russell's assignment of error in regard to the court's statutory authority to impose mental health treatment.

Because the court lacked statutory authority to impose mental health treatment, this condition should be removed from Russell's conditions of community supervision. Because Russell has, therefore, suffered no prejudice as a consequence of the court's erroneous imposition of mental health treatment, it is not grounds for withdrawal of his plea of guilty. *State v. Osequera Acevedo*, 137 Wn.2d 179, 970 P.2d 299 (1999).

7. The trial court erred by ordering Russell to complete mental health counseling as a condition of community supervision.

The trial court had authority to required Russell to undergo crime related treatment or counseling or rehabilitative programs. RCW 9.94A.703(3). However, RCW 9.94A.703 must be applied in conjunction with RCW 9.94B.010(2) and RCW 9.94B.080, which requires finding and prerequisite conditions that do not exist on the record of this case.

There is no finding that mental health contributed to Russell's offense in this case. There is no finding that Russell is a mentally ill

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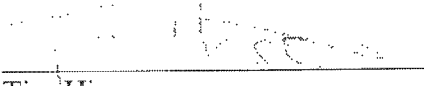
person as defined by RCW 71.24.025. Accordingly, the State respectfully concedes that the condition of mental health treatment was imposed in error and should be deleted from the conditions of community supervision.

D. CONCLUSION

For the reasons stated above, the State request that the court deny Russell's appeal.

DATED: February 6, 2012.

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